

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP728-CR

Cir. Ct. No. 2012CT228

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY L. WYATT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Tony L. Wyatt appeals from a judgment of conviction for operating a vehicle with a prohibited blood alcohol concentration

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(PAC) with a passenger under sixteen years of age. He contends the trial court erred in denying his motion to suppress by finding at the suppression hearing that the arresting law enforcement officer's testimony was credible and that his testimony and that of his witnesses was not and, as a result, concluding reasonable suspicion existed to stop the vehicle he was driving for a traffic violation. Wyatt also contends reasonable suspicion did not exist to extend the stop for an operating while intoxicated (OWI)/PAC investigation, and that probable cause was required, but did not exist, to conduct field sobriety tests. We affirm.

BACKGROUND

¶2 Wyatt was arrested for OWI/PAC and brought a motion to suppress evidence from the stop. The following relevant testimony was provided at the hearing on that motion. The Fond du Lac county sheriff's deputy who arrested Wyatt testified that around 4:00 a.m. on April 7, 2012, she ran a check on the license plate of a vehicle traveling in front of her on northbound Highway 41. Her check revealed that the owner of the vehicle, a female, did not have a valid driver's license. The deputy pulled over the vehicle and, upon approaching the driver's door, observed multiple young children in the vehicle, none of whom were in child car seats. Upon making contact with the driver with the aid of a flashlight, the deputy first learned that the driver, Wyatt, was a male, not a female. When discussing the child safety concerns with Wyatt, the deputy observed the odor of intoxicants on his breath and that he had "red, glossy eyes." She asked Wyatt if he had been drinking and Wyatt responded that he had had a couple beers about four hours earlier. The deputy had Wyatt perform field sobriety tests, and ultimately arrested him for OWI/PAC with passengers under the age of sixteen.

¶3 Wyatt's testimony differed from the deputy's. He testified that the deputy had been driving southbound on Highway 41 while he was driving northbound, and that he had made eye contact with her as she passed him. Wyatt stated multiple times in his testimony that he saw that the deputy was a female as she passed him. He further indicated that he had no problems seeing into the deputy's vehicle and determining that she was a female. Referencing certain local landmarks in the area, Wyatt testified that the deputy then turned around and followed him for approximately ten to fifteen miles before pulling him over.

¶4 Wyatt called two additional witnesses, the two adult passengers in the vehicle on the night of the arrest. Both witnesses, a front seat passenger and a back seat passenger, testified as Wyatt did—that the deputy's squad was originally southbound and, after passing their vehicle, made a U-turn before following and eventually stopping their vehicle. Both further testified that they observed the deputy to be a female. On this point, the front seat passenger testified as follows on direct examination by Wyatt's counsel:

Q All right. How do you know it was a female police officer?

A When she came up to the car.

Q Okay. But did you—I mean, you knew it was a female officer when she passed you?

A Yes.

Q Okay. So, she was heading southbound on Highway 41, you were heading northbound?

A Yes.

Q Okay. So, you knew it was a female officer that evening?

A Yes.

Q Did—was there anything obstructing her vision at all, do you know? In the squad car?

A No.

That witness also testified that the only child who was not in a car seat was his own child and that the others were all in car seats.

¶5 The rear seat passenger testified as follows on direct examination by Wyatt's counsel:

Q Okay. And do you recall observing or becoming aware that there was a police officer that was behind you at any point?

A We noticed her coming from the opposite direction on the other side of the median....

Q Do you know where she turned around?

A I'm not quite sure where she turned around, but I know she turned and came back behind us and followed us.

Q Did you ... personally make eye contact with her when she turned around or did you see—could you see the driver of the other vehicle?

A Yes, I could see her.

Q You could tell it was a police officer?

A Yes.

Q And you could tell it was a female police officer?

A Yes.

....

Q So ... could you describe, in length, how far you were from her vehicle probably?

A Well, can't really describe, like, how close we were, but we were close enough that you could tell it was a woman passing by.

On cross-examination, after testifying that they were driving around sixty-five miles per hour, this witness further testified:

Q Was there something notable that drew your attention to the—the vehicle driven by the officer?

A Well, she—it did look like she was looking over towards us as we were going.

Q And, so, you and the two people in the front seat all looked at this female officer driving southbound on Highway 41?

A Yes.

The court denied Wyatt's motion to suppress, finding the deputy more credible than Wyatt and his witnesses. Wyatt subsequently pled no contest to the PAC charge and now appeals. Additional facts are discussed as necessary.

DISCUSSION

¶6 On appeal, Wyatt challenges the lawfulness of both the initial and extended stop, arguing that, based on his and his witnesses' testimony, the deputy did not have reasonable suspicion to stop the vehicle he was driving and, further, that the deputy did not have reasonable suspicion to extend the stop to conduct an OWI/PAC investigation. He also contends the deputy needed, but did not have, probable cause to conduct field sobriety tests. We conclude the deputy had reasonable suspicion for both the initial stop and the extension of the stop. We further reject Wyatt's field sobriety test contention because reasonable suspicion is all that is required for such an investigative test and the deputy had such suspicion.

¶7 To execute a constitutionally valid investigatory traffic stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that a law violation is occurring or has occurred. *State v. Post*, 2007 WI 60, ¶13, 301

Wis. 2d 1, 733 N.W.2d 634. Whether a traffic stop is based on reasonable suspicion is a question of constitutional fact. *Id.*, ¶8. We review questions of constitutional fact applying a two-step standard of review. *State v. Walli*, 2011 WI App 86, ¶10, 334 Wis. 2d 402, 799 N.W.2d 898. We will uphold a trial court's findings of historical fact unless they are clearly erroneous. *Id.* We review de novo the application of those facts to constitutional principles, *Post*, 301 Wis. 2d 1, ¶8, including whether reasonable suspicion existed to justify the stop, *Walli*, 334 Wis. 2d 402, ¶10.

¶8 Our decision in *State v. Newer*, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923, is directly on point and governs the first issue in this case. In *Newer*, we held that “an officer’s knowledge that a vehicle’s owner’s license is revoked will support reasonable suspicion for a traffic stop so long as the officer remains unaware of any facts that would suggest that the owner is not driving.” *Id.*, ¶2.

¶9 The validity of the stop of the vehicle in this case turns on credibility. If the deputy is believed, she had reasonable suspicion, under *Newer*, to stop the vehicle because her check of the license plate indicated that the owner of the vehicle was not properly licensed and the deputy did not have reason to believe someone other than the owner was operating the vehicle until she made direct contact with the driver. If Wyatt and his witnesses are believed, the deputy passed Wyatt from the opposite direction and may have observed him operating the vehicle and further recognized that he was male, thus dispelling suspicion that the vehicle was being operated by its unlicensed female owner. In that case, Wyatt argues, the deputy would not have had reasonable suspicion under *Newer*.

¶10 As we have frequently stated, the weight of testimony and credibility of witnesses are to be determined by the trier of fact, and we will not disturb the trial court's determinations in this regard where more than one reasonable inference can be drawn from credible evidence. *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) (we give deference to the trial court's credibility determinations). Here, the trial court personally observed the demeanor and testimony of the deputy, Wyatt and his witnesses. The court believed the deputy and did not believe Wyatt or his witnesses. The court found Wyatt's story impossible and unbelievable in light of his testimony regarding the distance the deputy followed him and local landmarks. The court also did not believe that persons "traveling on opposite sides of the median, [at] 4:00 in the morning in a dark night, are going to make eye contact with each other and be able to indicate the gender of who is riding in another vehicle." The court continued:

I also find it somewhat suspicious that we have three different people who are all saying this. Nothing to draw their attention to a person on the other side of a median and all of a sudden they can all—they all come in with the same story that there's a woman driving a car. Interestingly, there isn't ... the identification of a particular officer, but simply a female.

It then held that the deputy had reasonable suspicion to stop the vehicle.

¶11 Reviewing the testimony, we note ample basis for affirming the trial court's belief of the deputy. In addition to the points noted by the trial court, which the record supports and with which we fully agree, we further note that the testimony of Wyatt's witnesses appears deliberately tailored to assist Wyatt in light of the holding in *Newer*. For example, when the front seat passenger testified that he knew the deputy was a female "[w]hen she came up to the car," Wyatt's

counsel directed the witness to an answer that would help Wyatt under *Newer*—“Q: Okay. But did you—I mean, you knew it was a female officer *when she passed you*? A: Yes.” (Emphasis added.) Shortly thereafter, that witness was led to testify that there was nothing obstructing the *deputy’s* vision. Further, the front seat passenger’s testimony seemed deliberately geared to cast Wyatt in as favorable a light as possible, including his testimony that no child, other than his own, was lacking a child car seat, which was in direct conflict with the deputy’s testimony that there were multiple young children in the vehicle, none of whom were in car seats.

¶12 The rear seat passenger’s testimony appears equally designed to aid Wyatt under *Newer*. When asked: “[D]o you recall observing or becoming aware that there was a police officer that was *behind* you at any point,” she responded: “We noticed her coming from the opposite direction on the other side of the median.” (Emphasis added.) Then, when asked: “[C]ould you describe, in length, how far you were from her vehicle probably,” she responded, “Well, can’t really describe, like, how close we were, but we were close enough that you could tell it was a woman passing by.”

¶13 The trial court’s suspicions regarding the testimony of Wyatt and his witnesses were well-founded. We find no error in the trial court’s belief of the deputy’s testimony over that of Wyatt and his witnesses, and its implicit finding that the deputy was not aware of the driver’s gender until she approached the driver’s window. Applying *Newer* to the facts as the trial court found them, we conclude the deputy had reasonable suspicion to stop the vehicle on the belief that

the driver, presumed under *Newer* to be the female owner of the vehicle, was operating the vehicle without a valid license.²

¶14 Wyatt next argues that the deputy unlawfully extended the stop to investigate him for OWI/PAC. He contends that “the mere odor of intoxicants and glassy, red eyes ... standing alone ... do not supply reasonable suspicion that a person is operating while intoxicated.”³ We disagree with Wyatt’s characterization and conclusion.

¶15 An officer may properly extend a traffic stop to investigate for OWI/PAC if he or she has reasonable suspicion that such a violation has occurred. See *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. Wyatt attempts to equate his position to that of the defendant in *State v. Meye*, No. 2010AP336, unpublished slip op. (WI App July 14, 2010), where we determined that the officer did not have reasonable suspicion to conduct an OWI investigation. However, in that case, we made clear that our decision was based on the fact that the only information the officer had was the odor of alcohol with “nothing else.” *Id.*, ¶6. Here, the deputy also observed Wyatt’s “red, glossy

² Wyatt argues that we should overturn our decision in *Newer* because it is bad law as “it promotes deliberate indifference and anti-diligent conduct on the part of the police.” We believe *Newer* was correctly decided, but even if we did not, we are nonetheless bound by it. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals cannot modify or withdraw its opinions).

³ Wyatt provides a 1997 National Transportation Safety Board report that red eyes alone are insufficient indicia to provide reasonable suspicion that a driver is operating while intoxicated. However, an officer is not required to rule out alternative possible reasons for red or bloodshot eyes, see generally, *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996), especially where, as here, the deputy also observed the odor of intoxicants coming from the driver, and the driver admitted to drinking a couple beers four hours earlier.

eyes,” had Wyatt’s admission that he had drunk a couple beers earlier in the evening, and the stop was occurring around 4:00 a.m.

¶16 We find this case more akin, indeed nearly identical, to *Dane County v. Judd*, No. 2011AP2106, unpublished slip op. (WI App July 19, 2012). In that case, the officer stopped the defendant while she was walking from her vehicle and after noticing her bloodshot, glassy eyes, and a “moderate to fairly strong” odor of intoxicants coming from her, questioned her about drinking, which she admitted to doing earlier that evening. *Id.*, ¶2. We concluded that these indicia were sufficient to provide the officer with reasonable suspicion to conduct an OWI investigation. *Id.*, ¶7; *see also State v. Hughes*, No. 2011AP647, unpublished slip op. ¶21 (WI App Aug. 25, 2011) (concluding that the “odor of alcohol, glassy eyes, and admission of drinking earlier” are indicia which support the conclusion that a driver operated with too much alcohol in his or her system). We reaffirm that conclusion here and hold that the deputy possessed reasonable suspicion, grounded in specific and articulable objective facts, that Wyatt was operating while intoxicated or with a prohibited blood alcohol concentration. *See Post*, 301 Wis. 2d 1, ¶10 (holding that an officer has reasonable suspicion if he or she is “‘able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion.” (citation omitted)). Accordingly, we affirm the trial court’s determination that the deputy had sufficient information to extend the stop to conduct an OWI/PAC investigation of Wyatt, including field sobriety tests.

¶17 Finally, Wyatt argues that the deputy lacked probable cause to conduct the field sobriety tests, contending that these tests are Fourth Amendment searches requiring a standard higher than reasonable suspicion. To conduct field sobriety tests as part of a temporary OWI/PAC investigative detention, however,

an officer need only have reasonable suspicion that the driver was operating while under the influence of an intoxicant. *See Colstad*, 260 Wis. 2d 406, ¶19. We agree with this standard but even if we did not, we are powerless to change it. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Because we have already found that the deputy had reasonable suspicion to extend the stop to investigate an OWI/PAC violation, we conclude that the field sobriety tests were proper.⁴

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁴ We note that in his brief-in-chief, Wyatt develops no argument as to why we should hold that the probable cause standard applies to field sobriety tests; rather he merely cites to cases from other jurisdictions. For this reason, too, we reject his “argument” on this point. *See Wisconsin Conference Bd. of Trustees of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶38, 243 Wis. 2d 394, 627 N.W.2d 469 (we do not address insufficiently developed arguments).

